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[CORRECTED]

IN THE

Supreme Court of the United States

Jean Mouelle and Germaine Mouelle,
Petitioners,

v.

Alberto R. Gonzales.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Given Congress's directive in 8 U.S.C. 1255 that paroled aliens may apply to adjust their status under specified conditions, may the Attorney General nonetheless categorically prohibit paroled aliens in removal proceedings from making such an application?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jean and Germaine Mouelle respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-13a) is published at 416 F.3d 923. The Eighth Circuit's order denying rehearing and rehearing en banc (Pet. App. 14a) is unpublished. The order of the Board of Immigration Appeals ("BIA") denying petitioners' motion to re-open their removal proceedings (Pet. App. 15a-16a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. The petition for rehearing and rehearing en banc was denied on October 26, 2005. On January 18, 2006, Justice Thomas extended the time to file this petition to and including February 23, 2006. App. 05A644. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1255, provides, in relevant part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 1154(a)(1) of this title or [sic] may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is

eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 1245.1(c) provides, in relevant part:

> The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act [8 U.S.C. 1255]:
>
> * * *
>
> (8) Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act * * *.

STATEMENT

In 8 U.S.C. 1255, Congress expressly provided that "paroled" aliens – that is, aliens who have been given temporary leave to enter the United States – may apply to adjust their status and become legal residents if they meet specified criteria. Notwithstanding this specific statutory directive, in 1997 the Attorney General issued 8 C.F.R. 1245.1(c)(8), which categorically prohibits paroled aliens from even applying to adjust their status if they are in removal proceedings at the time of the application.[1] The

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[1] As part of the Homeland Security Act of 2002, the operations of the Immigration and Naturalization Service ("INS") were transferred to the Department of Homeland Security ("DHS"), and the regulations were duplicated and renumbered. See Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.* As the court of appeals explained (Pet. App. 5a n.6), there are now, as a result, two functionally identical provisions: 8 C.F.R. 1245.1(c)(8) and 8 C.F.R. 245.1(c)(8). Section 245.1(c)(8) applies to the United States Citizenship and Immigration Services of the DHS, while Section 1245.1(c)(8) applies identical requirements to the immigration courts and the Board of Immigration Appeals ("BIA") of the Department of Justice. Accordingly, for ease of reference,

Eighth Circuit in this case upheld the regulation as valid. In so holding, the court recognized that its decision conflicted with the precedent of the First Circuit, which struck down the regulation as an invalid construction of Section 1255; two other circuits have subsequently joined the First Circuit in holding the regulation invalid.

1. Section 1255 comprehensively addresses the categories of aliens eligible, and ineligible, to apply for adjustment of status – *viz.*, the aliens able to apply for permanent resident status without having to leave the country. For example, the statute expressly excludes from eligibility alien crewmen, aliens continuing or accepting unauthorized employment, aliens admitted in transit without a visa, 8 U.S.C. 1255(c), and aliens who were married in the United States while in judicial proceedings, *id.* § 1255(e). Congress added further precision to this statutory scheme by creating exceptions to the exclusions – that is, restoring the eligibility of certain aliens who would otherwise be ineligible to apply for adjustment of status. See, *e.g.*, *id.* § 1255(i) (aliens rendered ineligible by § 1255(c) may nonetheless be eligible to apply for adjustment of status if specified criteria are met). See also *id.* § 1255(e)(3) (aliens who would otherwise be ineligible under § 1255(e) may apply for adjustment of status provided they entered into marriage in good faith).

By contrast, and particularly relevant to this case, Congress in Section 1255 specifically included among those eligible to apply for adjustment of status an "alien who was * * * paroled into the United States" – that is, an alien who was given temporary leave to enter the United States, see 8 U.S.C. 1182(d)(5)(A). Section 1255 in this respect departs from prior law. Until 1960, an alien who wished to become a permanent resident, but whose non-immigrant visa had expired, was required to leave this country and obtain an

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petitioners follow the court of appeals' practice of citing 8 C.F.R. 1245.1(c)(8) to encompass both regulations.

immigrant visa from a U.S. consular post abroad. See *Succar* v. *Ashcroft*, 394 F.3d 8, 13 (CA1 2005). This requirement imposed an unnecessary hardship on aliens who were otherwise eligible for permanent resident status. In 1960, Congress provided relief, amending 8 U.S.C. 1255(a) to expressly include paroled aliens in the category of individuals eligible to adjust their status while remaining in the United States.

Since its extension of eligibility for adjustment of status to paroled aliens in 1960, Congress has amended the provisions governing the eligibility criteria for other classes of aliens – including two amendments to Section 1255(a) itself – but has kept the eligibility of paroled aliens intact. See *Succar*, 394 F.3d at 24 n.20 (citing Historical and Statutory Notes, 8 U.S.C. 1255).

While specifying precisely who is eligible and ineligible to apply for adjustment of status under Section 1255, Congress vested the Attorney General with discretion to decide whether to grant the adjustment of status. See 8 U.S.C. 1255(a). Congress also granted the Attorney General the authority to promulgate regulations to guide the exercise of that discretion. See *id.* § 1103(g)(2).

In 1997, pursuant to her authority under 8 U.S.C. 1103(g)(2), the Attorney General issued new regulations that she indicated were intended to implement the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Although Congress in the IIRIRA had neither imposed any limitations on the eligibility of paroled aliens to apply for adjustment of status nor given "the Attorney General discretion to redefine eligibility," *Succar*, 394 F.3d at 35, the Attorney General nonetheless provided, in 8 C.F.R. 1245.1(c)(8), that "[a]ny arriving alien who is in removal proceedings" is categorically ineligible to apply for adjustment of status. The category of arriving aliens in removal proceedings prohibited from applying for adjustment

of status under the regulations includes "paroled aliens," see 8 C.F.R. 1001.1(q), because they are subject to statutorily mandated removal proceedings if not "clearly and beyond a doubt" entitled to admission, see 8 U.S.C. 1225(b)(2)(A).

2. Petitioner Jean Mouelle is a citizen of the Republic of Congo. Pet. App. 1a. In 1989, he entered the United States on a J-1 student exchange visa to pursue a Ph.D. in forestry. *Id.* 1a-2a. His wife, petitioner Germaine Mouelle (who is also a citizen of the Republic of Congo) entered the country as his dependent. *Id.* 2a.

After their visas expired, petitioners attempted to obtain permanent resident status. In 1994, Dr. Mouelle won the diversity lottery, a program that awards visas to immigrants from countries from which fewer than 50,000 immigrants have been awarded resident status in the preceding five years. Despite Dr. Mouelle's best efforts, however, the Congolese government failed to provide him with the necessary paperwork before his opportunity to obtain the diversity visa expired. Pet. App. 2a n.2.

On May 31, 1996, Dr. Mouelle filed an application for asylum and withholding of removal. Pet. App. 2a. Because members of his tribe were being targeted by the Congolese government, Dr. Mouelle averred that he and his family would be persecuted if they returned to Congo. See Petrs. Mot. for Stay of Removal 3.

In April 1998, the Immigration and Naturalization Service ("INS") began removal proceedings against petitioners. Pet. App. 2a. The charges (as subsequently amended) asserted that petitioners had failed to present a valid non-immigrant visa or border-crossing identification card when they had re-entered the United States from Canada after a one-day 1997 trip. See *id.* 3a.[2]

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[2] Petitioners had made the trip so that Dr. Mouelle could conduct field research and assist a class he was teaching. Pet. App. 2a. To ensure that they would be able to re-enter the country,

In response to the removal proceedings, petitioners renewed their request for asylum and withholding of removal, which the INS had not yet addressed. In August 1999, an immigration judge denied their claims and found that they were removable. In February 2003, the BIA affirmed the immigration judge's order. See Pet. App. 3a.

While the removal proceedings were pending, the INS approved a petition for a work visa that Germaine's employer had previously filed on her behalf, making the couple eligible to apply for permanent residence. Pet. App. 3a-4a. Petitioners accordingly requested that the BIA re-open removal proceedings and remand to the immigration judge to adjust their status as authorized under 8 U.S.C. 1255. *Ibid.*

The BIA denied petitioners' motion in July 2003. Relying on 8 C.F.R. 1245.1(c)(8), the BIA concluded that, because petitioners were arriving aliens in removal proceedings, they were categorically ineligible to apply to adjust their status. Pet. App. 4a.[3]

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petitioners applied for and received "advance parole," which may be issued to aliens in the United States who have "an unexpected need to travel abroad * * * and whose conditions of stay do not otherwise allow for readmission after temporary departure." U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 83 (2004), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. Like all paroled aliens, advance parolees are not considered "admitted," see 8 U.S.C. 1182(d)(5)(A) – that is, lawfully inspected aliens authorized to enter, 8 U.S.C. 1101(a)(13)(A). Thus, after the conditions of advance parole are met, advance parolees are subject to investigation regarding their eligibility for admission. See *id.* § 1182(d)(5)(A).

[3] In December 2003, the BIA also denied petitioners' motion for reconsideration of its July 2003 denial of the motion to re-open. See Pet. App. 17a-19a. That denial is not at issue here. See *id.* 4a n.4.

3. Petitioners timely appealed the BIA decision to the Eighth Circuit. Petitioners argued, *inter alia*, that 8 C.F.R. 1245.1(c)(8) is invalid because it categorically prohibits an entire class of aliens from applying for adjustment of status notwithstanding Congress's explicit directive in 8 U.S.C. 1255 that such aliens are eligible to apply in appropriate circumstances. That argument had been adopted by the First Circuit in *Succar*, *supra*. According to the First Circuit, the regulation was invalid under the first step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because in Section 1255 "'Congress ha[d] directly spoken to the precise question at issue'" – *viz.*, whether paroled aliens, such as petitioners, could be eligible to apply for adjustment of status. *Succar*, 394 F.3d at 22 (quoting *Chevron*, 467 U.S. at 842).

The Eighth Circuit expressly rejected the holding of *Succar*. Pet. App. 8a. First, the Eighth Circuit explained that in its view, 8 C.F.R. 1245.1(c)(8) is not "properly evaluated under *Chevron*'s first step, given the discretionary nature of the relief available under 8 U.S.C. § 1255." *Ibid.* Thus, although the Eighth Circuit agreed with the First Circuit that "Congress surely did speak to eligibility in" Section 1255, it construed the statute to leave "the question whether adjustment-of-status relief should be granted to the Attorney General's discretion." *Ibid.* Such discretion, the court emphasized, may be exercised either "by rule or on a case-by-case basis." *Id.* 9a (citing *Bellis* v. *Davis*, 186 F.3d 1092, 1094-95 (CA8 1999)).

Second, the Eighth Circuit rejected the First Circuit's reasoning that Section 1255's "unequivocal[]" statement that "statutorily eligible aliens must be allowed to apply for status adjustment" precluded the Attorney General from nonetheless by regulation categorically excluding those very aliens from applying for adjustment of status. Pet. App. 10a (citing *Succar*, 394 F.3d at 28). The Eighth Circuit concluded instead that the Attorney General's determination to categorically prohibit applications from aliens in removal

proceedings was consistent with the discretion conferred by Section 1255. The court found no reason why the Attorney General should "be forced to exercise his discretion through rules that speak only to the ultimate relief rather than eligibility[.]" Pet. App. 10a.

The court next rejected the First Circuit's view that this Court in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), had held that "if Congress had spoken to eligibility, then an administrator with discretion to grant relief cannot impose eligibility requirements that are not found in the statute." Pet. App. 11a. The Eighth Circuit distinguished *Cardoza-Fonseca* on the ground that 8 C.F.R. 1245.1(c)(8) "does not purport to interpret statutory eligibility standards but rather rests on the discretionary authority that Congress explicitly gave the Attorney General to grant adjustment-of-status relief." *Ibid.* Further, unlike the regulation at issue in *Cardoza-Fonseca*, the court below found that Section 1255 does not manifest a "congressional intent * * * that limits the Attorney General's ability to determine by regulation which statutorily eligible aliens will get the relief that he has the power, but not the duty, to grant." *Id.* 11a-12a.

After concluding that the regulation does not contravene Congress's express intent, the court moved to the second prong of the *Chevron* analysis. The Eighth Circuit expressly rejected the First Circuit's determination that the regulation was unreasonable because it "effectively barred most paroled aliens" from adjusting status. Pet. App. 12a n.9 (citing *Succar*, 394 F.3d at 18). The court first rejected, "as an evidentiary matter," the First Circuit's conclusion that the regulation bars "most" paroled aliens from adjusting their status. *Id.* 12a-13a n.9. In any case, that fact would not render the regulation invalid in the Eighth Circuit's view, because it found nothing in Section 1255 demonstrating "a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status." *Id.* 13a n.9.

The court then upheld the regulation as "reasonable" given the Attorney General's goal of expediting the removal of aliens. Pet. App. 12a. The Eighth Circuit reasoned that because applications for adjustment of status "would necessarily lengthen removal proceedings * * * and expediency was one of the goals of the 1996 [IIRIRA]," 8 C.F.R. 1245.1(c)(8) is valid. Pet. App. 12a-13a.

Judge Bye dissented. He would have held 8 C.F.R. 1245.1(c)(8) invalid for the reasons outlined by the First Circuit in *Succar*. See Pet. App. 13a.

4. Soon after the Eighth Circuit's ruling, two other circuits – the Third and Ninth – expressly rejected the Eighth Circuit's holding in this case and agreed with the First Circuit that Section 1245.1(c)(8) is invalid. *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005); *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005). Although petitioners' petition for rehearing and rehearing en banc specifically apprised the Eighth Circuit of the contrary decisions in *Zheng* and *Bona*, see Petrs. Pet. for Reh'g and Reh'g En Banc 1-2, 11-12, the court nonetheless denied rehearing and rehearing en banc, Pet. App. 14a.

In the Third and Ninth Circuit cases, the government requested that those courts hold further proceedings in abeyance and stay the mandate pending the outcome of this petition for certiorari. Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-71596 & -72488). The government explained that the question presented was both "an issue that affects the eligibility of numerous aliens to apply for adjustment of status to lawful permanent resident" and the subject of a clear and recurring circuit conflict that this Court could resolve in this case. *Ibid.*

This petition followed.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over whether, and if so why, 8 C.F.R. 1245.1(c)(8) is a valid interpretation of 8 U.S.C. 1255. This conflict is untenable not only because it results in the disparate treatment of paroled aliens across the country, but also because of the extraordinary impact of the question presented on the lives of those affected by the regulation. This case presents the ideal vehicle to resolve the question presented, which was squarely addressed below and was the sole basis for the court of appeals' decision. Finally, certiorari is also warranted because the Eighth Circuit's decision is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

8 C.F.R. 1245.1(c)(8) precludes *all* paroled aliens in removal proceedings from applying for adjustment of status. Whether the regulation is a valid interpretation of 8 U.S.C. 1255 is the subject of a widely acknowledged circuit conflict. Two circuits – the First and Ninth – hold that the regulation is invalid under the first step of the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because Congress considered and decided the question when it enacted the statute. The Third Circuit has also concluded that the regulation is invalid but disagrees with the reasoning of the First and Ninth Circuits, holding instead that the regulation survives the first step of *Chevron* but fails the second because it unreasonably interprets the statute. By contrast, only the Eighth Circuit has upheld 8 C.F.R. 1245.1(c)(8) as a valid interpretation of Section 1255.

In recent pleadings to the Third and Ninth Circuits, the government itself has recognized that the question presented "has created a significant circuit split,"[4] as have the courts of

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[4] Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-

appeals. See Pet. App. 8a; *Zheng* v. *Gonzales*, 422 F.3d 98, 111-12, 119-20 (CA3 2005); *Bona* v. *Gonzales*, 425 F.3d 663, 668 n.6 (CA9 2005). The BIA and commentators have similarly acknowledged the division in the circuits. *E.g.*, *In re Toussaint*, No. A96 001 425, 2006 WL 211046, at *1 n.1 (B.I.A. Jan. 10, 2006); *In re Cano-Porras*, No. A29 466 462, 2005 WL 3016055, at *2 (B.I.A. Aug. 15, 2005); Gerald Seipp, *Law of "Entry" and "Admission": Simple Words, Complex Concepts*, 05-11 IMMIGR. BRIEFINGS 1, 22 n.129 (Nov. 2005); *Ninth Circuit Joins First and Third Circuits in Invalidating Regulations Rendering "Arriving Aliens" in Removal Proceedings Ineligible for AOS*, 82 INTERPRETER RELEASES 1793, 1799-1800 (2005).

1. As the Eighth Circuit acknowledged, see Pet. App. 8a, its holding directly conflicts with the precedent of the First Circuit. In *Succar* v. *Ashcroft*, 394 F.3d 8 (2005), the First Circuit relied on the first prong of *Chevron* to hold that 8 C.F.R. 1245.1(c)(8) is invalid because it directly conflicts with 8 U.S.C. 1255. See 394 F.3d at 35-36.[5] Because Congress in Section 1255(a) "defined certain categories of aliens who were eligible to apply for adjustment of status * * * and refined the definition by specifically excluding certain aliens from eligibility" elsewhere in the same provision, the First Circuit reasoned that Congress had "unambiguously reserved to itself the determination" of which aliens may apply. 394 F.3d at 24. Section 1245.1(c)(8) fails the first step of *Chevron*, the court

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71596 & -72488); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634).

[5] See also *Rivera* v. *Ashcroft*, 394 F.3d 37, 40 (CA1 2005) (remanding the BIA's denial of a parolee's motion to apply for adjustment of status, holding that the order could not be sustained because Section 1245.1(c)(8) provided "the sole basis" for the agency's action).

concluded, because it conflicts with Congress's explicit determination in Section 1255 that paroled aliens in removal proceedings who meet specified criteria be eligible to apply for adjustment of status. *Id.* at 24-26.

The conclusion that the regulation is an invalid implementation of Section 1255 is bolstered, the First Circuit found, by the broader statutory scheme, through which "Congress clearly stated that most parolees would be in removal proceedings." 394 F.3d at 26. While acknowledging that Congress had authorized the Attorney General to decide "whether to grant permanent resident status" in individual cases, the court held that Congress had *not* authorized the Attorney General to render ineligible the entire class of paroled aliens in removal proceedings without any consideration of individual circumstances. *Id.* at 28. Citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 443 (1987), the First Circuit explained that "[t]he mere fact that a statute gives the Attorney General discretion as to whether to grant relief after application does not by itself give the Attorney General the discretion to define eligibility for such relief." 394 F.3d at 10.

Finally, the First Circuit concluded, the legislative history confirms that deeming paroled aliens in removal proceedings ineligible to apply for adjustment of status would actually "re-institute the very problems which Congress attempted to eliminate" in Section 1255. 394 F.3d at 34. In particular, the court found that Congress intended to make the application process more efficient by abolishing the wasteful practice of requiring a paroled alien to leave the country in order to apply for adjustment of status, a practice that Section 1255 was meant to end, but which the regulation would once again reinstate for many paroled aliens. *Id.* at 33.

The Ninth Circuit has similarly acknowledged the circuit conflict and invalidated the regulation. In *Bona* v. *Gonzales*, 425 F.3d 663, 668 n.6 (CA9 2005), that court expressly "reject[ed]" the holding of the Eighth Circuit in this case and instead adopted the First Circuit's holding in *Succar*. *Id.* at

665. Like the First Circuit, the Ninth Circuit reasoned that the regulation fails the first step of the *Chevron* analysis because it contradicts Congress's explicit determination "of which aliens were eligible to apply for adjustment of status." *Id.* at 669-70. The court further emphasized that the contradiction was "absurd" given "the larger statutory scheme." *Ibid.*

The Third Circuit, in turn, also has expressly rejected the Eighth Circuit's ruling in this case, although it reached that result under the second step of the *Chevron* analysis. See *Zheng* v. *Gonzales*, 422 F.3d 98, 120 (CA3 2005). Unlike the First and Ninth Circuits, the Third Circuit concluded that Congress's statutory determination of eligibility and ineligibility for some categories of aliens "does not in itself conclusively prove that the Attorney General cannot declare other categories ineligible by regulation." *Id.* at 116. The Third Circuit noted that this Court held in *Lopez* v. *Davis*, 531 U.S. 230 (2001), that the Bureau of Prisons had statutory discretion to deny early release to a class of prisoners by regulation. Though it found the question "close," the Third Circuit accordingly held that Section 1245.1(c)(8) is not invalid under the first step of *Chevron* because Section 1255 is "ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status." 422 F.3d at 116.

The Third Circuit nonetheless held that 8 C.F.R. 1245.1(c)(8) is invalid under the second step of *Chevron*. The court reasoned that the regulation was an unreasonable interpretation of Section 1255 because it contravenes "Congress's clearly expressed intent * * * to allow most paroled aliens to apply for adjustment of status," by barring almost every parolee from applying for such adjustment. 422 F.3d at 119. See also *id.* at 117 ("It is clear from the statutory text that Congress intended for virtually all parolees to be in removal proceedings.").

2. Only this Court can resolve the circuit conflict. In concluding that 8 C.F.R. 1245.1(c)(8) is a valid interpretation of Section 1255, the Eighth Circuit expressly acknowledged the contrary holding of the First Circuit and proceeded to reject not only the result but also every aspect of that court's reasoning. See *supra* at 8-9. The Eighth Circuit subsequently refused to reconsider its position, denying rehearing en banc even after petitioners drew its attention to the subsequent contrary decisions of the Ninth and Third Circuits. See Petrs. Pet. for Reh'g and Reh'g En Banc 1-2.

The positions of the other circuits are similarly entrenched. Before reaching its conclusion in *Zheng*, the Third Circuit devoted nine pages of its opinion to rejecting the reasoning of both the First and Eighth Circuits. See 422 F.3d at 111-20. The Third Circuit subsequently denied the Attorney General's petition for rehearing. And although the First Circuit was the first court of appeals to address the question presented, it issued two separate opinions outlining its *Chevron*-based reasoning at length. See *supra* at 11-12. The Ninth Circuit, which explicitly adopted the First Circuit's rationale in *Bona*, *supra*, has since reaffirmed that holding in a unanimous panel decision without even hearing oral argument on the question. See *Ali* v. *Gonzales*, 154 Fed. Appx. 608 (Nov. 16, 2005) (unpublished).

3. The question presented would not benefit from further percolation. Although the courts of appeals have fully considered each other's approaches, they have then employed divergent reasoning to reach diametrically conflicting results. Indeed, this legal issue cannot develop further because the circuits have reached every possible analytical result under the two-step *Chevron* analysis: the First and Ninth Circuits hold that 8 C.F.R. 1245.1(c)(8) is invalid at step one; the Third Circuit holds that the regulation is invalid at step two; and the Eighth Circuit holds that the regulation is valid.

4. Nor is there any genuine prospect that the circuit split will be resolved by withdrawal or amendment of the

regulation. Three successive attorneys general have vigorously enforced the regulation through two presidential administrations. Attorney General Gonzales continued to defend Section 1245.1(c)(8) in the Third, Eighth, and Ninth Circuits even after the First Circuit struck the regulation down in January 2005.[6] In fact, the Department of Homeland Security ("DHS") has attempted to enforce the regulation in the Ninth Circuit even after that court found it invalid in *Bona*. See *Ali*, 154 Fed. Appx. at 608. Further, the BIA has consistently rejected challenges to Section 1245.1(c)(8) in circuits that have not held the regulation invalid. See, *e.g.*, *Toussaint*, 2006 WL 211046, at *1 (acknowledging the circuit split but remaining unpersuaded "that the First Circuit's decision in [*Succar*] warrants a different result"); *Cano-Porras*, 2005 WL 30016055, at *2 (acknowledging *Succar* but nonetheless holding paroled alien ineligible to seek adjustment of status).

5. This case provides the ideal vehicle for deciding whether 8 C.F.R. 1245.1(c)(8) is a valid interpretation of 8 U.S.C. 1255. The issue was squarely presented and preserved below and is outcome-determinative for petitioners, who may apply to adjust their status only if this Court decides that 8 C.F.R. 1245.1(c)(8) is invalid.[7]

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[6] Cf. *Plumaj* v. *Gonzales*, 141 Fed. Appx. 186 (CA4 Aug. 19, 2005) (per curiam) (upholding BIA denial of aliens' motion to reconsider its order denying aliens the opportunity to apply for adjustment of status because aliens were ineligible under Section 245.1(c)(8)).

[7] The court of appeals did not reach the separate question whether petitioners satisfy other statutory eligibility requirements. See Pet. App. 5a-6a; Petrs. C.A. Br. 16-20; Resp. C.A. Br. 17-24. That question remains open for decision on remand. Cf. *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

The conflict over the validity of 8 C.F.R. 1245.1(c)(8) merits this Court's attention in light of the question's undeniable importance. Whether the regulation is valid – and, thus, whether aliens such as petitioners are eligible to apply for adjustment of status – has widespread implications for a large group of individuals. The government agrees. Despite previously citing "internal statistics" suggesting that few paroled aliens are affected by the regulation, see Resp. Supp. Br. Post-Arg. 13 n.1, the government subsequently advised the courts of appeals that the question presented "affects the eligibility of *numerous* aliens."[8]

In 2003, the last year for which the relevant data is reported, 264,777 paroled aliens entered the United States. See U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 81 tbl.G (2004), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. As the Third and First Circuits have both recognized, "virtually all parolees will be in removal proceedings" – and thus subject to the regulation – at some point given the mandate of Section 1225(b)(2)(A). *Zheng*, 422 F.3d at 117; *Succar*, 394 F.3d at 27 ("Congress purposefully classified paroled individuals as 'inadmissible,' and it also determined that they should generally be placed in removal proceedings.").

The regulation not only affects a large group of aliens, but it also has significant ramifications for each of the affected individuals. Put simply, what is at stake is the opportunity to stay in a country in which one has made a

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[8] Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634) (emphasis added); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-71596 & -72488) (same).

home. Many of those affected by this regulation have established deep roots in the United States and have become active members of their communities. "Until the final order of removal, which in some circumstances * * * can take years, paroled aliens in removal proceedings * * * live, work and form relationships within the United States." *Succar*, 394 F.3d at 16.

Indeed, petitioners themselves epitomize the profound impact of this regulation. During the seventeen years they have been in the United States, the Mouelles have integrated themselves into their community. They have become valued employees,[9] are active members of their church, and own a home. Petitioners are raising two children, ages twelve and fourteen, who were born in the United States, are U.S. citizens, and have never been to Congo. See Petrs. Mot. to Stay the Mandate 3.

Should petitioners be forced to return to Congo – a country still recovering from civil conflicts that began in 1997 and continued through December 2003 – their lives would change drastically. Congo, which has a seventy-percent poverty rate, remains politically unstable as "[u]ncontrolled and unidentified armed elements remain[] active in" parts of the country. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: REPUBLIC OF CONGO (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41598.htm. The State Department has found that "the Government's human rights record remain[s] poor," ethnic

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[9] See Letter from Trancey B. Williams, Minn. Dep't of Nat'l Resources (Apr. 17, 2001) (administrator indicating that he would "gladly give up ten other employees just to hold on to [Dr. Mouelle]"), attached as Ex. to Petrs. Response to DHS Opp. to Mot. to Reopen; Memo. from John Boughton, Mgr. of Int'l Nurse Recruitment, LLC to Bureau of Citizenship and Immigration Services (Mar. 19, 2003) (describing Germaine Mouelle as a "valued employee"), attached as Ex. to Petrs. Mot. to Reopen to Apply for Adjustment of Status.

discrimination "remain[s] a problem," and security forces beyond the government's control commit serious human rights abuses that include rape and arbitrary arrest and detention. *Ibid.*

Given the importance of the question presented, it is not surprising that the regulation has been the subject of repeated recent challenges. Four circuits have decided the question. The regulation has also been challenged in the Fifth and Eleventh Circuits and at least one district court (in the Second Circuit), but those courts did not reach the question.[10] Additional cases challenging the regulation are currently pending in the Second, Fifth, Seventh, and Eleventh Circuits,[11] and there is no reason to believe that the pace of litigation will slow.

Particularly given that the Constitution contemplates "an uniform Rule of Naturalization," U.S. CONST. art. I, § 8, the notion that an alien's eligibility to apply for adjustment of status depends on the fortuity of the circuit in which he resides is entirely untenable. The very point of having federal

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[10] See *Diarra* v. *Gonzales*, 137 Fed. Appx. 627, 631-32 (CA5 2005); *Shah* v. *United States Attorney Gen.*, 151 Fed. Appx. 748, 751 (CA11 2005) (per curiam); *Kadriovski* v. *Gantner*, No. 04 Civ. M3168, 2004 WL 2884261, at **4-5 (S.D.N.Y. Dec. 13, 2004). Although the Fourth Circuit has not addressed the regulation's validity, that court has applied it in at least one case. See *Plumaj* v. *Gonzales*, 141 Fed. Appx. 186 (CA4 2005) (per curiam).

[11] See *Li* v. *Gonzales*, Nos. 03-41059 & 04-0902 (CA2); *Sanchez-Montoya* v. *Gonzales*, No. 04-1071 (CA2); *Singh* v. *Gonzales*, No. 04-0136 (CA2); *Salman* v. *Gonzales*, No. 04-60895 (CA5); *Dhurota* v. *Gonzales*, No. 05-2083 (CA7); *Scheerer* v. *Gonzales*, No. 04-16231-CC (CA11); *Sampedro-Dominguez* v. *Gonzales*, No. 05-13390-AA (CA11); *Garcia* v. *Gonzales*, No. 05-12059-DD (CA11); see also Mary A. Kenney, *American Immigration Law Foundation Practice Advisory: Adjustment of Status for "Arriving Aliens" in Removal Proceedings: Strategy Decisions to Challenge 8 C.F.R 245.1(c)(8)* 12-13 (2005), *available at* http://www.ailf.org.

rules rather than local control over immigration is undermined by an intractable split among the circuits.

III. The Text and Structure of 8 U.S.C. 1255 Establish Congress's Intent to Extend to Petitioners the Ability to Apply for Adjustment of Status.

Certiorari is also warranted because the decision below is wrong on the merits. The detailed eligibility scheme established by 8 U.S.C. 1255 manifests Congress's intent to allow certain classes of aliens, including many paroled aliens, to apply for adjustment of status. By categorically precluding "[a]ny arriving alien who is in removal proceedings," 8 C.F.R. 1245.1(c)(8), from seeking an adjustment of status, the regulation excludes individuals who fit within the category of persons Congress specifically determined should be entitled to seek adjustment. The regulation thereby conflicts with the plain terms of Section 1255 and upsets the carefully calibrated eligibility scheme established by the statute.

1. When analyzing the validity of an agency regulation, the first step is to determine – based on "traditional tools of statutory construction" – "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 842 (1984). If so, the courts and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Moreover, as in all immigration cases, any residual ambiguity should be resolved in favor of petitioners and result in invalidation of the regulation, in accord with the "longstanding principle of construing any lingering ambiguities in [removal] statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

In Section 1255, Congress clearly anticipated that aliens such as petitioners – *i.e.*, paroled aliens in removal proceedings – would be eligible to apply to adjust their status. First, in Section 1255(a), Congress extended eligibility to apply to adjust status to two broad classes of aliens – (1) those inspected and admitted; and (2) paroled aliens, who are

considered "applicant[s] for admission," see 8 C.F.R. 1001.1(q). Second, Congress established a detailed statutory scheme that generally results in paroled aliens being placed in removal proceedings: Section 1225(b)(2)(A) expressly provides that an "applicant for admission * * * *shall* be detained for a [removal] proceeding" unless he is clearly entitled to be admitted. 8 U.S.C. 1225(b)(2)(A) (emphasis added). See also *Zheng* v. *Gonzales*, 422 F.3d 98, 117 (CA3 2005) (statute explicitly envisions that the overwhelming majority of paroled aliens "will *necessarily* be in removal proceedings").[12]

Section 1245.1(c)(8), by contrast, prohibits all "arriving alien[s]" in removal proceedings from applying to adjust their status. Because all paroled aliens are deemed arriving aliens[13] and, as noted above, will generally be in removal proceedings, the regulation directly conflicts with Section 1255 by categorically barring adjustment of status applications from one of the two broad classes of aliens – *viz.*, paroled aliens – that Congress expressly specified are eligible to apply.

2. Having established broad eligibility for two classes of aliens – those who are inspected and admitted and those who are paroled – Congress in Section 1255 further refined eligibility for adjustment of status. As the First Circuit noted, Congress "made numerous and explicit policy choices about who is eligible for adjustment of status relief, who is ineligible, and of those ineligible, who is nonetheless eligible

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[12] As the Third Circuit has stressed, "[p]arole is a form of relief from immigration *detention*; it is not a form of relief from *removal proceedings*." *Zheng*, 422 F.3d at 117.

[13] Pursuant to 8 C.F.R. 1001.1(q), an arriving alien is, *inter alia*, "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry." Paroled aliens are considered "applicant[s] for admission." *Ibid.*

with certain application restrictions." *Succar* v. *Ashcroft*, 394 F.3d 8, 29 (2005).

This reticulated scheme demonstrates that Congress has specified which aliens who might otherwise fall within Section 1255(a)'s broad eligibility definition are nonetheless ineligible to apply for adjustment of status. Significantly, none of Congress's refinements to the statute categorically provide "that an alien is ineligible to adjust status if he is in removal proceedings." *Succar*, 394 F.3d at 25.[14]

Section 1255(c), for instance, restricts the eligibility of alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without a visa. Section 1255(i) adds further precision to the regulatory scheme, extending adjustment of status eligibility to aliens who obtain work-related visas even if they would otherwise be ineligible pursuant to Section 1255(c).

That Congress took great care in defining eligibility to adjust status is also reflected in 8 U.S.C. 1255(e), the only provision that deems relevant an alien's presence in removal proceedings. Section 1255(e) carves out a small class of otherwise eligible aliens – those applying for adjustment of status based upon a marriage entered into while in removal proceedings – as ineligible to adjust their status. Reading Section 1255 to grant the Attorney General power to categorically prohibit all paroled aliens in removal proceedings from applying to adjust their status renders the eligibility scheme carefully constructed by Congress – and in particular Section 1255(e) – surplusage. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause,

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[14] The absence of any indication in the statute that presence in removal proceedings should be relevant to eligibility is particularly significant because Congress has amended Section 1255 more than a dozen times since 1960, but has never suggested that aliens in removal proceedings are ineligible to adjust their status.

sentence, or word shall be superfluous, void, or insignificant." (internal quotes omitted)).

The degree of specificity and complexity exhibited on the face of this statute demonstrates that "Congress unambiguously reserved to itself the determination of who is eligible to apply for adjustment of status relief." *Succar*, 394 F.3d at 24. This conclusion is bolstered, not weakened, by *Lopez* v. *Davis*, 531 U.S. 230 (2001).[15] Contra *Zheng*, 422 F.3d at 113-14. In *Lopez*, this Court held that the imposition by regulation of eligibility requirements for an early-release program beyond those established by statute was a valid exercise of agency discretion. The Court relied on the fact that the statute in question, beyond granting discretion to reduce sentences of nonviolent offenders, did not identify "any further circumstance in which the Bureau either must grant the reduction, or is forbidden to do so." 531 U.S. at 242. By contrast, 8 U.S.C. 1255, which is replete with such references – varying eligibility to apply for adjustment by reference to, *inter alia*, work status, marital status, and residency status – reflects Congress's intent to constrain the Attorney General's discretion to establish categorical eligibility requirements.

3. The regulation also frustrates Congress's purposes in enacting 8 U.S.C. 1255. Congress sought to make application

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[15] *Lopez* is relevant to the first step of the *Chevron* inquiry, when Congress has answered the precise question at issue in the case. In *Zheng*, the Third Circuit asserted that *Lopez* puts the agency's "discretionary authority squarely within the second step of the *Chevron* framework." 422 F.3d at 113. This is only because "where Congress has enacted a law that does not answer 'the precise question at issue,' all we must decide is whether the [agency] * * * has filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" *Id.* at 113-14 (quoting *Lopez*, 531 U.S. at 242). When, as here, Congress has answered the precise question at issue, the analysis properly takes place within the framework of the first step of *Chevron*.

for adjustment of status less burdensome on the applicant and on the government by eliminating needless departures and re-entries:

> Congress, in amending the adjustment of status statute, wished to avoid a situation that, "not only necessitate[s] the reinstatement of the fallacious procedure known as 'preexamination' and consisting of round trips to Canada for the sole purpose of obtaining an immigrant visa, but will certainly greatly increase the number of private bills."

Succar, 394 F.3d at 33 (quoting S. REP. NO. 86-1651 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3124, 3137). In making this determination, "Congress clearly evaluated the administrative inconvenience to the INS of the expanded category of those eligible to apply for adjustment of status and nonetheless altered the prior procedure." *Id.* at 34.

The Attorney General's regulation returns a significant class of intended beneficiaries – paroled aliens – to precisely the situation the 1960 amendments were intended to avoid. This case is a perfect example. Under the agency's rule, not only must petitioners return to Congo and face a potentially threatening political climate before applying for adjustment of status, but they will then remain inadmissible to the United States for ten years, see 8 U.S.C. 1182(a)(9)(B)(i)(II), after which they may only apply from outside the United States. This is exactly what Congress intended to prevent with Section 1255.

4. To be sure, Section 1255 provides that the Attorney General retains discretion to decide whether eligible applicants will ultimately receive a status adjustment. See, *e.g.*, 8 U.S.C. 1255(a) ("status * * * may be adjusted by the Attorney General"); *id.* § 1255(i)(2) ("the Attorney General may adjust the status"). The statute's provisions must, however, be read as a whole. See *Pollard* v. *E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001). The Attorney

General's discretion cannot be read so broadly as to undo Congress's determination to permit paroled individuals to seek adjustment of status relief and its more general determination to specify the classes of persons who are, and are not, eligible to apply.

Notwithstanding the discretion retained by the Attorney General under Section 1255, the categorical bar created by Section 1245.1(c)(8) results in individual paroled aliens who would otherwise receive adjustment of status being denied the ability even to apply. In considering whether to exercise his discretion with respect to a particular application to adjust status, the Attorney General conducts an individualized determination, looking at such factors as family ties, hardship, and length of residence in the United States. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).[16]

He weighs those favorable factors against any adverse factors – such as a preconceived intent to remain in the United States or deliberate misstatements to a U.S. consul. See CHARLES GORDON ET AL., 4-51 IMMIGRATION LAW AND PROCEDURE § 51.05 (2005). "In the absence of adverse factors, adjustment will ordinarily be granted * * *." *Elkins*, 435 U.S. at 667 (citing *Arai*, 13 I. & N. Dec. at 496) (emphasis omitted). And even if adverse factors are present, favorable factors – in particular, an applicant's status as the immediate relative of a U.S. citizen or a lawful permanent resident, see *Matter of Ibrahim*, 18 I. & N. Dec. 55, 57-58 (B.I.A. 1981) – generally "will be considered as countervailing factors meriting favorable exercise of administrative discretion." *Elkins*, 435 U.S. at 667.

Thus, although the Attorney General would otherwise be very likely to exercise his discretion in favor of aliens – such

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[16] In *Elkins*, this Court relied on the BIA's then-recent decision in *Matter of Arai*, 13 I. & N. Dec. 494, 496 (B.I.A. 1970), noting that "[a]lthough adjustment of status is a matter of grace, not right," *Arai* was "binding" law on how that discretion was to be exercised. 435 U.S. at 667.

as petitioners – with close ties to the United States and the prospect of significant hardship if they were required to return to Congo, those aliens are unable even to apply for adjustment of status merely by virtue of being paroled aliens in removal proceedings. Given that significant numbers of paroled aliens *would* receive adjustments of status if they were accorded the individualized determination contemplated by Congress, the Attorney General has provided no reason why he should be permitted to categorically exclude *all* paroled aliens in removal proceedings from consideration.

5. The text, structure, and history of 8 U.S.C. 1255 clearly communicate Congress's intent regarding the precise issue at question in this case – *i.e.*, whether the Attorney General has discretion to declare all arriving aliens in removal proceedings ineligible to apply for adjustment of status. The answer to this question being no, the Court need not reach step two of the *Chevron* framework to determine whether the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

But even if this Court were to find that 8 U.S.C. 1255 "is ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status," *Zheng*, 422 F.3d at 116, the regulation would still be invalid because it is manifestly contrary to the statute and not "'reasonable in light of the legislature's revealed design.'" *Ibid.* (quoting *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). The strongest indication of the regulation's unreasonableness is the effect it would have on paroled aliens. As detailed above, "[w]e are thus faced with a statute providing that, in general, aliens paroled into the United States may apply to adjust their status, and a regulation providing that, in general, they may not." *Zheng*, 422 F.3d at 119. While administrative agencies generally receive broad deference in interpreting statutes, courts "have an even higher obligation to respect the clearly expressed will of Congress." *Id.* at 120. Here, when the regulation "essentially reverses the eligibility structure set out by

Congress," *ibid.*, in a manner that would make "a nullity of the statute," *INS* v. *Yang*, 519 U.S. 26, 31 (1996), that obligation mandates setting aside 8 C.F.R. 1245.1(c)(8) and allowing petitioners to apply for adjustment of status.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 2006

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 03-1760/03-3086

JEAN MOUELLE; GERMAINE MOUELLE,
PETITIONERS,
v.
ALBERTO GONZALES,[1] ATTORNEY GENERAL OF THE UNITED STATES,
RESPONDENT.

Submitted: October 21, 2004
Opinion Filed: July 29, 2005

Petitions for Review of Orders of the Board of Immigration Appeals.

Before BYE, BEAM, and GRUENDER, Circuit Judges.

OPINION

BEAM, Circuit Judge.

Jean and Germaine Mouelle ask us to grant a petition for review regarding two Board of Immigration Appeals (BIA) decisions rendered in their removal proceedings. We deny the petitions.

I. BACKGROUND

Jean Mouelle, a native and citizen of the Republic of Congo, entered the United States in 1989 as a J-1 exchange

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[1] Alberto Gonzales has been appointed to serve as Attorney General of the United States, and is substituted as respondent pursuant to Federal Rule of Appellate Procedure 43(c).

visitor so he could pursue masters and doctoral degrees from the University of Idaho. His wife, Germaine, also a native and citizen of the Republic of Congo, entered the United States as a dependent of an exchange visitor. The Mouelles did not return to the Republic of Congo when their nonimmigrant visas expired.

In May 1996, Jean filed an application for asylum and withholding of removal, naming Germaine as a dependent.[2] In May 1997, while their asylum application was pending, Jean was presented with the opportunity to go to Canada for field research and to assist a class that he was teaching. Cognizant of their immigration status and the likelihood that they would not be able to reenter the United States if they went to Canada, the Mouelles contacted the Immigration and Naturalization Service[3] and applied for advance parole, which would allow them to reenter the United States. The INS granted that request. The Mouelles left the United States on May 31, 1997, and reentered a day later, on June 1, 1997, at Eastport, Idaho, pursuant to their advance parole.

On April 15, 1998, the INS commenced removal proceedings against the Mouelles, serving them with notices to appear before an immigration judge. At the first removal hearing in August 1998, the INS realized the allegations contained in the notices to appear were inaccurate. The

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[2] Jean also came very close to obtaining lawful residency in 1994 when he won the diversity visa lottery. But, as a J-1 nonimmigrant, Jean was required to obtain a "no objection" letter from the Congolese government in order to relieve him of the J-1 two-year foreign residency requirement under 8 U.S.C. § 1182(e). Though Jean ultimately did get the "no objection" letter, he did not get it before his ability to obtain a diversity visa had expired.

[3] In March 2003, the functions of the Immigration and Naturalization Service were transferred to the newly formed Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, 6 U.S.C. §§ 101 et seq.

Mouelles, however, agreed to allow the INS to add additional removal charges. Those new charges sought removal under 8 U.S.C. §§ 1182(a)(7)(A)(i)(I) & (B)(i)(II), essentially for the Mouelles' failure to present proper documentation when they reentered the United States in June 1997. At the next removal hearing in October 1998, the Mouelles admitted that they were inadmissible under subsection (B)(i)(II) when they sought reentry in June 1997, and the immigration judge found that they were also inadmissible under subsection (A)(i)(I). In lieu of removal, Jean renewed his request for asylum and withholding of removal, which apparently had not yet been addressed by the INS. The immigration judge set the matter for an evidentiary hearing in August 1999.

At the evidentiary hearing in August 1999, the immigration judge denied the Mouelles' claims for asylum and withholding of removal. After finding that the Mouelles were removable, the immigration judge granted them the privilege of voluntary departure so long as they depart before October 5, 1999, and post departure bonds.

The Mouelles appealed the immigration judge's ruling to the BIA. The BIA affirmed the immigration judge's decision in February 2003. But because the Mouelles had not posted their departure bonds, the BIA revoked their privilege of voluntary departure, making the Mouelles immediately removable.

During the three-and-a-half years that their appeal was pending, the Mouelles sought employment-based visas. Jean filed an I-140 Immigrant Petition for Alien Worker on April 28, 2001. That petition was denied in November 2001, because Jean had not shown that it was in the nation's interest for the Attorney General to waive the job-offer requirement of 8 U.S.C. § 1153(b)(2)(B). Germaine had an I-140 Immigrant Petition for Alien Worker filed on her behalf by her employer, Presbyterian Homes and Services, Inc. That petition was approved in August 2002 under 8 U.S.C. § 1153(b)(3)(A)(i) or (ii) (skilled workers or professionals).

The Mouelles did not try to adjust their immigration status based on Germaine's approved I-140 petition until March 2003, after the BIA had affirmed the immigration judge's decision. In March 2003, the Mouelles filed applications to adjust their immigration statuses under 8 U.S.C. § 1255(i). And in May 2003, the Mouelles filed a motion to reopen their removal proceedings and remand the matter to the immigration judge so that they could apply for adjustment of status.

In July 2003, the BIA denied the Mouelles' motion to reopen, stating that they "are ineligible for adjustment of status because they are 'arriving aliens' in removal proceedings, notwithstanding the approved [I-140] visa petition."

The Mouelles were scheduled to be removed from the United States on May 7, 2003. We have stayed their removal, pending the resolution of their petitions for review.

The Mouelles have two pending petitions for review that have been consolidated here. The first, No. 03-1760, concerns the BIA's February 2003 denial of the Mouelles' asylum application. The second, No. 03-3086, concerns the BIA's July 2003 denial of the Mouelles' motion to reopen the removal proceedings.[4]

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[4] The Mouelles also filed a motion for reconsideration with the BIA in August 2003, asking the BIA to reconsider its July 2003 denial of their motion to reopen. The motion for reconsideration was denied in December 2003. The Mouelles have not petitioned for review of that decision, so it is not before us. *See Raffington v. INS*, 340 F.3d 720, 722 (8th Cir. 2003).

II. DISCUSSION

A. No. 03-1760: Asylum and Withholding of Removal

With regard to the initial BIA decision in February 2003, denying their claims for asylum and withholding of removal, the Mouelles argue only that the immigration judge violated their Fifth Amendment procedural due process rights.[5] The Mouelles did not present the due process issue to the BIA in their appeal or in their motion to reopen. Thus, we are without jurisdiction to consider it. *Sayaxing v. INS*, 179 F.3d 515, 522-23 (7th Cir. 1999). And, even if we had jurisdiction, the Mouelles' due process claim fails because they have not addressed, let alone established, prejudice--"that the outcome of the proceeding may well have been different had the due process violation not occurred." *Ismail v. Ashcroft*, 396 F.3d 970, 975 (8th Cir. 2005).

B. No. 03-3086: Adjustment of Status

All of the Mouelles' remaining arguments address the BIA's July 2003 denial of their motion to reopen the removal proceedings to allow them to apply for adjustment of status under 8 U.S.C. § 1255(i). "We have jurisdiction to review the BIA's denial of the motion to reopen for abuse of discretion." *Sidikhouya v. Gonzales*, 407 F.3d 950, 951 (8th Cir. 2005).

The BIA refused to reopen the Mouelles' removal proceedings because they were "arriving aliens in removal proceedings" under 8 C.F.R. § 1245.1(c)(8)[6] and were thus

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[5] Specifically, the Mouelles argue that the immigration judge failed to give them sufficient time to fully present their asylum and withholding-of-removal claims, interrupted Jean's testimony with questioning, "failed to elicit specific and detailed testimony that was material and significant," drew "odd conclusions before testimony was even completed," interrupted Jean's attorney, and cut off counsel's closing argument.

[6] The regulations were duplicated and renumbered while the Mouelles' proceedings were pending. As part of the Homeland

ineligible to apply for relief under 8 U.S.C. § 1255(i). The Mouelles make two arguments: (1) they were in fact eligible to adjust status under the regulations, and (2) if they were not, the regulations are invalid.

1. Status-Adjustment Eligibility Under the Regulations

As a matter of regulatory construction, the BIA's conclusion was correct. Section 1245.1(c) of the regulations lists certain categories of aliens who are "ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act [8 U.S.C. § 1255]." And section 1245.10(b) of the regulations--which deals specifically with adjustments under 8 U.S.C. § 1255(i)--incorporates those exclusions through its reference to section 1245.1(b), which, in turn, references section 1245.1(c). One of the section 1245.1(c) categories of ineligible aliens is "any arriving alien who is in removal proceedings pursuant to . . . section 240 of the Act [8 U.S.C. § 1229a]." 8 C.F.R. § 1245.1(c)(8).

The Mouelles were in removal proceedings under 8 U.S.C. § 1229a when they made their motion to reopen. But they argue that the BIA abused its discretion by denying their motion based on 8 C.F.R. § 1245.1(c)(8) because they are not arriving aliens. The term "arriving alien" is defined as

> an applicant for admission coming or attempting to come into the United States at a port-of-entry . . . . An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act [8 U.S.C. § 1182(d)(5)], *except that . . . an alien who was granted advance parole which*

Security Act of 2002 and the transfer of immigration responsibilities to the DHS, the regulations were duplicated from Chapter I, renumbered in the 1000 series, and placed in Chapter V of Title 8. We cite to the Chapter V regulations, though the same regulations can be found in Chapter I. For instance 8 C.F.R. § 1245.1(c)(8) matches 8 C.F.R. § 245.1(c)(8).

> *the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act* [8 U.S.C. § 1225(b)(1)(A)(i)].

8 C.F.R. § 1001.1(q) (emphasis added). The Mouelles argue that their receipt of advance parole before going to Canada qualified them for the italicized exception. It did, but that exception is for the limited purpose of 8 U.S.C. § 1225(b)(1)(A)(i), which requires immigration officers to order some arriving aliens immediately removed "without further hearing or review." In other words, under the regulations, the Mouelles were arriving aliens when they sought reentry and their parole into the United States did not generally affect that status. But the italicized language does preclude expedited removal in their cases because they were granted advance parole. The regulation does not, however, allow aliens arriving with advance parol to shed their arriving-alien status for the purpose of adjusting immigration status. Rather, the quoted regulation preserves that status notwithstanding the aliens' arrival. And if such aliens are in removal proceedings when they first try to adjust status,[7] the regulations make them ineligible. So the Mouelles were arriving aliens in removal proceedings and were thus barred from adjusting their statuses.

2. Validity of 8 C.F.R. § 1245.1(c)(8)

The Mouelles argue, alternatively, that 8 C.F.R. § 1245.1(c)(8) is invalid. After this case had been argued and submitted, *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), was decided. The *Succar* court concluded that 8 C.F.R.

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[7] An arriving alien who seeks to renew an adjustment application in removal proceedings can do so under certain circumstances. See 8 C.F.R. § 1245.2(a).

§ 1245.1(c)(8) was inconsistent with 8 U.S.C. § 1255(a),[8] and was thus invalid under the first step of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, because "Congress had directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984) (quoted in *Succar*, 394 F.3d at 22). We allowed the parties to supplement their briefs, and we accepted an amicus brief in support of the Mouelles from the American Immigration Law Foundation.

We respectfully disagree with the First Circuit's decision in *Succar*. *Succar* rested on the notion that Congress had explicitly determined what classes of aliens were and were not eligible to apply for discretionary adjustment-of-status relief. 394 F.3d at 29. Given that congressional judgment—constituting, in the court's opinion, a clear expression of its intent—the court held that the regulation was invalid under the first step of *Chevron* because it added eligibility requirements. *Id.* And, even though the statute vested the Attorney General with full discretion to grant or deny adjustment-of-status relief, the court concluded that the regulation could not properly be characterized as a rule-based exercise of that discretion. *Id.*

We do not believe 8 C.F.R. § 1245.1(c)(8) is properly evaluated under Chevron's first step, given the discretionary nature of the relief available under 8 U.S.C. § 1255. While Congress surely did speak to eligibility in the statute, it left the question whether adjustment-of-status relief should be granted to the Attorney General's discretion. 8 U.S.C. § 1255(a) ("the status of an alien who was inspected and admitted or paroled . . . *may be adjusted by the Attorney General, in his discretion and under such regulations as he*

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[8] Notably, the Mouelles did not seek to adjust status under section 1255(a). They sought to adjust under section 1255(i). Nonetheless, the reasoning of the *Succar* court, if correct, is broad enough to invalidate the regulation as inconsistent with the statutory scheme at issue.

may prescribe" (emphasis added)); *id.* § 1255(i)(2) ("the Attorney General *may* adjust the status of the alien") (emphasis added). Administrators vested with such discretion may exercise that discretion by rule or on a case-by-case basis. *Bellis v. Davis*, 186 F.3d 1092, 1094-95 (8th Cir. 1999). And we can find no basis upon which to conclude that this regulation does not embody the Attorney General's decision not to afford discretionary relief to the delineated class of aliens—arriving aliens in removal proceedings. Attorney General Reno stated this discretionary-relief basis for the regulation when it was proposed. "The Attorney General has determined that she will not favorably exercise her discretion to adjust the status of arriving aliens who are ordered removed pursuant to section 235(b)(1) of the Act or who are placed in removal proceedings under section 240 of the Act." 62 Fed. Reg. 444, 452 (Jan. 3, 1997). And she again stressed the discretionary nature of status adjustments when the interim rule issued:

> Some commenters objected to the policy statement contained in the proposed rule that amended § [1]245.1(c)(8) and indicated that, as an exercise of discretion, the Attorney General would not adjust the status of arriving aliens . . . in proceedings under section 240 of the Act.
>
> . . . .
>
> In response to the commenters who suggested this policy exceeded the Attorney General's statutory authority, it is noted that section 245 of the Act [8 U.S.C. § 1255] clearly and unambiguously states that adjustment of status is a discretionary decision, subject to such regulatory limitations as the Attorney General may prescribe.

62 Fed. Reg. 10312, 10326-27 (Mar. 6, 1997). As Judge Friendly wrote with regard to 8 U.S.C. § 1255(a), "We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis . . . ." *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970); *see also Bellis*, 186 F.3d at 1095 (concluding that the Bureau of Prisons validly exercised its discretion to grant early release by "identifying additional categories of inmates who are ineligible for the early-release program"), *aff'd*, *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001).

Even though 8 C.F.R. § 1245.1(c)(8) says that the particular class of aliens at issue is "ineligible to apply for adjustment of status," that does not change matters. The *Succar* court concluded this was of primary significance, finding that Congress had unequivocally stated that statutorily eligible aliens must be allowed to apply for status adjustment. 394 F.3d at 28. But why should the Attorney General be forced to exercise his discretion through rules that speak only to the ultimate relief rather than eligibility? If the Attorney General decided that arriving aliens in removal proceedings will not be given adjustment-of-status relief (as she clearly did in promulgating this rule), and if that decision does not contravene the statute (as we conclude it does not), then it makes little sense to invalidate this regulation simply because it speaks in terms of eligibility. *See Lopez*, 531 U.S. at 243-44 ("Even if a statutory scheme requires individualized determinations, which this scheme does not, the decision-maker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. . . . Case-by-case decisionmaking in thousands of cases each year, . . . could invite favoritism, disunity, and inconsistency." (citations and quotations omitted)).

The *Succar* court concluded that *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), established the difference between statutory eligibility and the Attorney General's discretion to grant relief. It then took that premise and concluded that if Congress had spoken to eligibility, then an administrator with discretion to grant relief cannot impose eligibility requirements that are not found in the statute. We cannot find support for the latter premise in *Cardoza-Fonseca*. The Court in *Cardoza-Fonseca* did emphasize the difference between eligibility and the discretionary decision to grant relief, but it did so in a much different context than that presented here.

The BIA in *Cardoza-Fonseca* had construed the statutory eligibility standard for asylum (a form of discretionary relief) as requiring the same showing—a clear probability of persecution—as the statutory eligibility standard for withholding of deportation (a form of relief that must be given to an eligible alien). *Id.* at 443. The Court reasoned that the BIA's construction did not fit the statutes because the difference between the nature of the relief available under each—discretionary versus mandatory—evinced a congressional intent that the eligibility standard for discretionary asylum would be less demanding than the eligibility standard for mandatory withholding. *Id.* at 443-44. But the Court did not hold that the Attorney General could not by regulation determine who among the class of aliens that is statutorily eligible for discretionary relief would or would not be afforded such relief. It simply held that the BIA's interpretation of the statute in that case failed because Congress did not intend the heightened mandatory-withholding showing to apply to discretionary asylum.

This case is quite different. First, the regulation at issue does not purport to interpret statutory eligibility standards, but rather rests on the discretionary authority that Congress explicitly gave the Attorney General to grant adjustment-of-status relief. And, even if we take *Cardoza-Fonseca* as somehow relevant to our inquiry, there is no congressional

intent evinced by a similar mandatory-relief provision that limits the Attorney General's ability to determine by regulation which statutorily eligible aliens will get the relief that he has the power, but not the duty, to grant.

As a rule-based exercise of the Attorney General's discretion to allow status adjustments, we conclude section 1245.1(c)(8) of the regulations is not invalid as contrary to the statute. This does not mean, however, that the regulation is necessarily valid. To be valid, such gap-filling regulations must be "reasonable in light of the legislature's revealed design." *Lopez*, 531 U.S. at 242 (quotation omitted); *accord Fook Hong Mak*, 435 F.2d at 731 ("reasonably related to the statutory scheme"). The class of aliens delineated by 8 C.F.R. 1245.1(c)(8) consists of (1) arriving aliens who are (2) in removal proceedings. As mentioned, arriving aliens are aliens who seek admission to the United States at a port-of-entry. The Attorney General's stated reasons for delineating this class of aliens clearly show that the classification is reasonable under the statutory scheme. *See* 62 Fed. Reg. at 10312-13 & 10326-27. And arriving aliens' placement in removal proceedings is a characteristic that is a reasonably sound basis for choosing not to grant relief under 8 U.S.C. § 1255(i).[9] Applications for such relief would necessarily

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[9] The court in *Succar* opined that the relevant characteristic—placement in removal proceedings—effectively barred most aliens who had been paroled from adjusting status because most paroled aliens were in removal proceedings. 394 F.3d at 18. Thus, the court concluded, the regulation was contrary to 8 U.S.C. § 1255(a) because paroled aliens were among those eligible to adjust status under the statute. As an evidentiary matter, we cannot conclude that the regulation bars most paroled aliens from adjusting status. Unlike the court in *Succar*, we have not been "informed," *id.*, of that fact. And in this case the Attorney General cites DHS statistics suggesting that only about two to three percent of parolees who entered the United States in 2003 have been placed in removal proceedings. Resp. Supp. Br. at 13 n.1. In fact, the INS did not

lengthen removal proceedings (much like they have here), and expediency was one of the goals of the 1996 amendments to the Immigration and Nationality Act. See S. Rep. No. 104-249, 1996 WL 180026, at *2 (Apr. 10, 1996). Thus, we conclude the regulatory bar to status adjustment contained in 8 C.F.R. § 1245.1(c)(8) is valid and the BIA did not abuse its discretion by denying the Mouelles' motion to reopen on that basis.

We have considered all of the Mouelles' other arguments that are properly presented by their petitions for review, and we find them without merit.

III. CONCLUSION

Accordingly, we deny the petitions.

DISSENT

BYE, Circuit Judge.

I respectfully dissent. I would hold 8 C.F.R. § 1245.1(c)(8) is invalid for the reasons articulated in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Accordingly, I would vacate the removal orders and remand for further proceedings.

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initiate removal proceedings against the Mouelles until April 15, 1998, over ten months after the Mouelles were paroled into the United States. Moreover, even if we assumed that most aliens paroled into the United States were placed in removal proceedings, 8 U.S.C. § 1255 does not show a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status. Relief remains discretionary.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 03-1760/03-3086

JEAN MOUELLE; GERMAINE MOUELLE,

PETITIONERS,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

RESPONDENT.

October 26, 2005

Order Denying Petition for Rehearing and for Rehearing En Banc.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-01199)

Order Entered at the Direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, VA 22041

DECISION OF THE BOARD OF
IMMIGRATION APPEALS

Files: A75 016 234 – Bloomington, Minnesota
A75 016 233

Date: Jul. 22, 2003

In re: JEAN MOUELLE
GERMAINE M. MOUELLE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Nancy A. Peterson, Esquire

ON BEHALF OF DHS: Richard Soli, District Counsel

APPLICATION: Reopening

Now before the Board of Immigration Appeals is the respondents' timely filed motion to reopen. The respondents, who are a married couple, seek reopening to apply on remand for adjustment of status. The female respondent has an approved third preference skilled worker visa petition. As pointed out in the opposition memorandum by the Department of Homeland Security (the "DHS," formerly the

Immigration and Naturalization Service), the respondents are ineligible for adjustment of status because they are "arriving aliens" in removal proceedings, notwithstanding the approved visa petition. *See INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam); section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255; 8 C.F.R. § 245.1(c)(8) (2003) (now renumbered as § 1245.1(c)(8)). Accordingly, we will deny the motion to reopen.

ORDER: The motion to reopen is denied.

/s/ Edward R. Grant
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, VA 22041

DECISION OF THE BOARD OF
IMMIGRATION APPEALS

Files: A75 016 234 – Bloomington, Minnesota
A75 016 233

Date: Dec. 02, 2003

In re: JEAN MOUELLE
GERMAINE M. MOUELLE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Nancy A. Peterson, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law (both respondents)[1]
Lodged: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] – Immigrant – no

[1] During the course of proceedings, the DHS withdrew this charge of removability against both respondents.

valid immigrant visa or entry document (both respondents)

Sec. 212(a)(7)(B)(i)(II), I&N Act [8 U.S.C. § 1182(a)(7)(B)(i)(II)] – Immigrant – no valid immigrant visa or entry document (Both respondents)

APPLICATION: Reconsideration

ORDER:

PER CURIAM. The record in this case was last before us July 22, 2003, when we denied the respondents' motion to reopen. The respondents have filed a timely motion to reconsider. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not filed a response to the motion.

In our prior order, we denied the respondents' motion to reopen, in which they sought to apply for adjustment of status, because they are "arriving aliens" in removal proceedings and thus are ineligible to adjust their status to that of lawful permanent residents. *See* Decision of Board.

A motion to reconsider asserts that the Board made a factual or legal error at the time it rendered the previous decision. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd*, 979 F.2d 212 (11th Cir. 1992) (table case); *see also* 8 C.F.R. § 1003.2(b) (2003). The respondents assert that we erred in determining that they were arriving aliens because they were paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5), prior to April 1, 1997. The respondents alternatively request that we hold the regulations to be *ultra vires* to the Act. *See* Motion to Reconsider.

Specifically, the respondents argue that 8 C.F.R. § 1001.1(q) excludes aliens who were paroled into the United States before April 1, 1997, from the definition of "arriving alien." However, a plain reading of the entirety of subsection

(q) demonstrates that such parolees are not to be considered arriving aliens solely for the purposes of expedited removal under section 235(b)(1)(A)(i) of the Act, 8 U.S.C. 1225(b)(1)(A)(i). The exclusion of such parolees from the regulatory definition of "arriving alien" is for a specific and limited purpose. Accordingly, it is reasonable to consider pre-April 1, 1997, parolees as arriving aliens for all other purposes.

The regulations further provide that an arriving alien who is in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, is ineligible for adjustment of status. 8 C.F.R. § 1245.1(c)(8). The respondents in the instant case are in removal proceedings under section 240 of the Act and, thus, are ineligible to adjust their status.[2] Accordingly, we find no error in our prior order denying their motion to reopen.

As far as the respondents' argument that the Attorney General's regulations are *ultra vires* to the Act, we lack the authority to make such a ruling, and, therefore, we decline to consider such argument. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335,339 (BIA 1991) (stating that it is "well-settled that it is not within the province of this Board to pass on the validity of the statutes and regulations we administer").

In light of the foregoing discussion, the respondents' motion to reconsider is denied.

/s/ David B. Holmes
FOR THE BOARD

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[2] We note that the forms on which the DHS used to add charges of inadmissibility against the respondents, Form I-261, incorrectly suggest that the respondents are in "deportation proceedings" under former section 242 of the Act. However, it is clear that the DHS simply used an outdated version of the form, and as indicated by the original Notices to Appear, the respondents are in removal proceedings pursuant to current section 240 of the Act.

Supreme Court, U.S.
FILED
MAY 22 2006
OFFICE OF THE CLERK

(2)

No. 05-1092

In the Supreme Court of the United States

JEAN MOUELLE AND GERMAINE MOUELLE,
PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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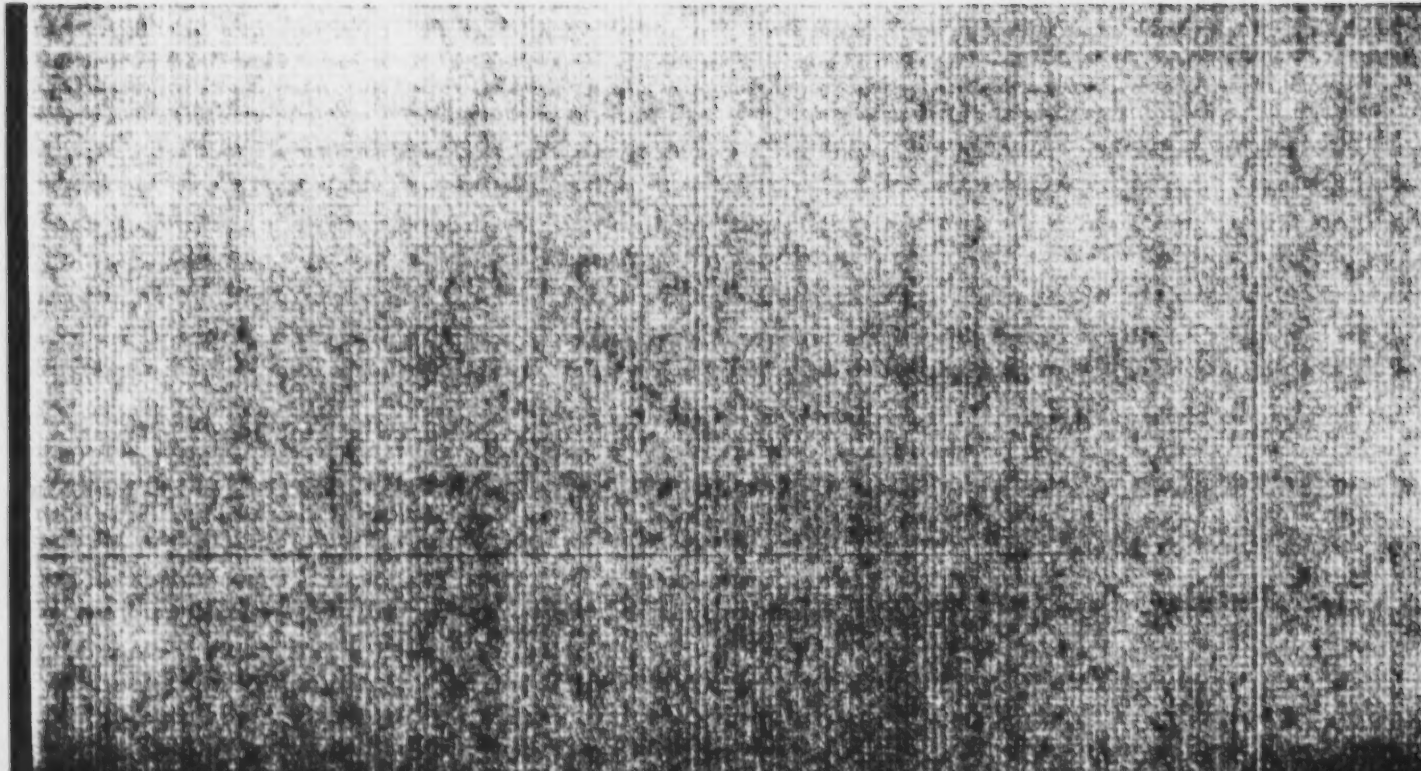

QUESTION PRESENTED

Under Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), "[t]he status of an alien who was inspected and admitted or paroled into the United States * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence" if certain conditions are satisfied. Under 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) (2005) (repealed May 12, 2006), an "arriving alien who is in removal proceedings," including one who has been paroled into the United States, is not eligible to apply for adjustment of status. The question presented is whether the regulations, as applied to paroled aliens, are inconsistent with the statute and therefore invalid.

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In the Supreme Court of the United States

No. 05-1092

JEAN MOUELLE AND GERMAINE MOUELLE,
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v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 416 F.3d 923. The decisions of the Board of Immigration Appeals denying petitioners' motion to reopen (Pet. App. 15a-16a) and denying petitioners' motion to reconsider (Pet. App. 17a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. A petition for rehearing was denied on October 26, 2005 (Pet. App. 14a). On January 18, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 23, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255 (2000 & Supp. III 2003), authorizes the Attorney General, in the exercise of discretion, to adjust an eligible alien's status to that of a lawful permanent resident alien. "[A]s an exercise of discretion," 62 Fed. Reg. 10,326 (1997), the Attorney General determined, through regulations most recently codified at 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) (2005) (repealed May 12, 2006), that an "arriving alien who is in removal proceedings" is not eligible to apply for adjustment of status.[1] An "arriving alien" is "an applicant for admission coming or attempting to come into the United States at a port-of-entry" and, with limited exceptions, "remains such even if paroled pursuant to section 212(d)(5) of the [INA]." 8 C.F.R. 1.1(q), 1001.1(q) (2005).[2] The regula-

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[1] The Attorney General's determination predated the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, which transferred the responsibilities of the former Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS), while retaining the Executive Office for Immigration Review (EOIR) under the authority of the Attorney General in the Department of Justice (DOJ). See 6 U.S.C. 275, 291, 521 (Supp. III 2003); 8 U.S.C. 1103(a) and (g) (2000 & Supp. III 2003). One of the regulations at issue here—Section 245.1(c)(8)—appeared in Chapter I of Title 8, which contains regulations of DHS; the other regulation—Section 1245.1(c)(8)—appeared in Chapter V of Title 8, which contains regulations of EOIR. The two provisions are identical.

[2] Section 212(d)(5) of the INA gives the Attorney General authority to parole from custody "any alien applying for admission" who would otherwise be detained until a decision is made either to admit or to remove the alien. 8 U.S.C. 1182(d)(5)(A). To exercise the parole authority, the Attorney General must find either that "urgent humanitarian reasons" justify the parole or that paroling the alien will yield a "significant public benefit." *Ibid.*

tions were adopted to prevent aliens who arrive illegally in the United States from "delay[ing] their removal through an application for adjustment of status," 62 Fed. Reg. 452 (1997), and to help "preserve the integrity of the visa issuance process," *id.* at 10,326, by requiring an arriving alien "to return to his or her country of residence and request [an immigrant visa] through the consular process," *id.* at 452.

The regulations that make arriving aliens in removal proceedings ineligible for adjustment of status have been challenged by petitioners and other aliens as inconsistent with Section 245 of the INA insofar as they apply to those aliens in removal proceedings who have been granted parole from custody. Those challenges rely on the language in Section 245(a) that gives the Attorney General discretion to adjust the status of aliens "inspected and admitted or *paroled* into the United States" if certain conditions are satisfied. 8 U.S.C. 1255(a) (emphasis added).[3] Four courts of appeals have held that the regulations are inconsistent with the statute, and therefore invalid, because they remove the ability to obtain adjustment of status for some aliens who are eligible to apply under Section 245(a) of the INA. *Scheerer* v. *United States Attorney General*, No. 04-16231, 2006 WL 947680 (11th Cir. Apr. 13, 2006); *Bona* v. *Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng* v. *Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar* v. *Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Two courts of appeals have upheld the regulations, finding that the denial of adjustment of sta-

[3] The conditions are (1) that "the alien makes an application for such adjustment"; (2) that "the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence"; and (3) that "an immigrant visa is immediately available to [the alien] at the time his application is filed." 8 U.S.C. 1255(a).

tus to the particular category of arriving aliens who are placed in removal proceedings but released on parole is a valid exercise of the Attorney General's discretionary authority to grant or deny adjustment of status. *Momin* v. *Gonzales*, No. 05-60119, 2006 WL 1075235 (5th Cir. Apr. 24, 2006); *Mouelle* v. *Gonzales*, 416 F.3d 923 (8th Cir. 2005) (decision below).

Recognizing that "the conflicting court of appeals decisions * * * will result in inconsistent application of the adjustment of status laws," the Attorney General and the Secretary of Homeland Security have determined that "having rules that apply nationwide is preferable to continuing to litigate the validity of [the regulations]." 71 Fed. Reg. 27,587 (2006). DHS and DOJ have therefore "undertaken to resolve the [circuit] conflict," *ibid.*, by issuing interim rules, effective May 12, 2006, *id.* at 27,585, that repeal 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8). 71 Fed. Reg. at 27,591. The effect of the repeal is to allow the designated administrative decisionmaker to "exercise discretion to grant applications for adjustment of status * * * by aliens who have been paroled into the United States and who have been placed in removal proceedings." *Id.* at 27,588. However, the interim rules make clear that, as was true under the regulations in effect prior to 1997, such aliens will ordinarily not be able to submit or renew applications for adjustment of status in the removal proceedings themselves. *Id.* at 27,587-27,588. Instead, consistent with longstanding limitations on the jurisdiction of an immigration judge (IJ), *id.* at 27,586, 27,587-27,588, adjustment applications filed by arriving aliens (including those released on parole) who are in removal proceedings will in most cases be adjudicated by United States Citizenship and Immigration Services (USCIS) in DHS.

Id. at 27,587-27,588, 27,591-27,592 (amending 8 C.F.R. 245.2(a)(1) and 1245.2(a)(1)).[1]

2. Petitioners, Jean Mouelle (Jean) and Germaine Mouelle (Germaine), are husband and wife and citizens of the Republic of Congo. In 1989, Jean entered the United States as a J-1 exchange visitor to study at the University of Idaho. Germaine entered the United States as the dependant of a J-1 exchange visitor. When their non-immigrant visas expired, petitioners did not return to the Republic of Congo. Pet. App. 1a-2a.

In May 1996, Jean Mouelle filed an application with INS for asylum and withholding of removal, naming his wife as a dependent. On May 31, 1997, while the application was pending, petitioners made a brief trip to Canada. Before departing, they sought and received advance parole, which allowed them to return to the United States to pursue their application for asylum. They returned on June 1, 1997, at Eastport, Idaho. Pet. App. 2a.

3. a. In April 1998, the INS commenced removal proceedings against petitioners. They were charged with inadmissibility under 8 U.S.C. 1182(a)(7)(A)(i)(I) and (B)(i)(II), for failing to present proper documentation upon reentering the United States in June 1997. Petitioners admitted that they were inadmissible, but renewed their application for asylum and withholding of removal. The IJ found petitioners inadmissible, denied their application for asylum and withholding of removal,

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[1] The rules retain an exception for an alien who leaves the United States while an adjustment application is pending, returns under a grant of advance parole, is placed in removal proceedings, and has his application denied by USCIS. In such a case, an IJ has jurisdiction to adjudicate a renewed adjustment application. 71 Fed. Reg. at 27,591-27,592 (amending 8 C.F.R. 1245.2(a)(1)).

and granted them the privilege of voluntary departure, subject to the posting of a bond. Pet. App. 2a-3a; Admin. R. 178-198.

In February 2003, the Board of Immigration Appeals (BIA) affirmed the IJ's decision. It revoked the privilege of voluntary departure, however, because petitioners had failed to post the required bond. Pet. App. 3a; Admin. R. 114-115.

b. While their appeal was pending before the BIA, petitioners had each sought an employment-based visa, by filing an I-140 Immigrant Petition for Alien Worker. In November 2001, Jean's petition was denied; in August 2002, Germaine's petition was granted. In May 2003, after the BIA had affirmed the IJ's decision, petitioners filed a motion with the BIA to reopen the removal proceedings. Petitioners requested a remand so that the IJ could adjust their status under Section 245(i) of the INA, 8 U.S.C. 1255(i), based on Germaine's approved visa petition. Pet. App. 3a-4a.[2]

In July 2003, the BIA denied the motion to reopen. Pet. App. 15a-16a. Citing 8 C.F.R. 1245.1(c)(8), it held that petitioners were "ineligible for adjustment of status

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[2] An alien may apply for adjustment of status under Section 245(i) if he or she is physically present in the United States, falls within one of the classes enumerated in Section 245(c) of the INA, and is the beneficiary of a petition for an immigrant visa filed with the Attorney General on or before April 30, 2001. 8 U.S.C. 1255(i)(1). The classes enumerated in Section 245(c) include aliens who are in "unlawful immigration status" or have "failed * * * to maintain continuously a lawful status since entry into the United States," 8 U.S.C. 1255(c)(2), and aliens who seek adjustment of status on the basis of an employment-based visa and are "not in a lawful nonimmigrant status," 8 U.S.C. 1255(c)(7). The Attorney General "may adjust the status" of an alien seeking adjustment under Section 245(i) if certain conditions are satisfied. 8 U.S.C. 1255(i)(2).

because they are 'arriving aliens' in removal proceedings." Pet. App. 16a. Petitioners filed a motion for reconsideration, which the BIA denied. *Id.* at 17a-19a.

4. Petitioners petitioned for review of the BIA's affirmance of the IJ's decision and its denial of petitioners' motion to reopen. Pet. App. 4a. The court of appeals consolidated the petitions and, in a divided opinion, denied them. *Id.* at 1a-13a.

a. The court of appeals first rejected petitioners' contention that the IJ violated their due process rights during the removal proceedings. Pet. App. 5a. The court held that petitioners failed to present that claim to the BIA, thereby depriving the court of jurisdiction to consider it, and, in any event, could not demonstrate prejudice. *Ibid.*

The court of appeals next rejected petitioners' contention that, because they were granted advance parole before leaving for Canada, they were not ineligible for adjustment of status under 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8), and that the BIA therefore erred in denying their motion to reopen. Pet. App. 6a-7a; see *id.* at 5a n.6. The court explained that the regulations render an "arriving alien who is in removal proceedings" ineligible for adjustment of status; that, under 8 C.F.R. 1.1(q) and 1001.1(q), "arriving alien" includes an applicant for admission who has been paroled into the United States; that the exception in Sections 1.1(q) and 1001.1(q) for aliens granted advance parole "is for the limited purpose of 8 U.S.C. § 1225(b)(1)(A)(i), which requires immigration officers to order some arriving aliens immediately removed 'without further hearing or review'"; and that Sections 1.1(q) and 1001.1(q) do not "allow aliens arriving with advance parol[e] to shed their arriving-alien

status for the purpose of adjusting immigration status." Pet. App. 6a-7a.

The court of appeals then rejected petitioners' contention that the BIA should have granted their motion to reopen on the alternative ground that 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) are inconsistent with Section 245 of the INA and therefore invalid. Pet. App. 7a-13a. "While Congress surely did speak to eligibility in [Section 245]," the court explained, "it left the question whether adjustment-of-status relief should be granted to the Attorney General's discretion." *Id.* at 8a. The court thus held that Congress has not "directly spoken to the precise question at issue," and that the regulations therefore are not invalid under the first step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842). The court then held that the "gap-filling regulations" were "reasonable in light of the legislature's revealed design," and thus valid under the second step of *Chevron*. *Id.* at 12a (quoting *Lopez* v. *Davis*, 531 U.S. 230, 242 (2001)). The court explained that applications for adjustment of status "would necessarily lengthen removal proceedings (much like they have here), and expediency was one of the goals of the 1996 amendments to the [INA]." *Id.* at 12a-13a.

b. Judge Bye filed a dissenting opinion. Pet. App. 13a. He would have held 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) invalid for the reasons identified by the First Circuit in *Succar*, *supra*. Pet. App. 13a.

ARGUMENT

Petitioners contend (Pet. 10-26) that 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) are inconsistent with Section 245 of the INA and therefore invalid. The court of ap-

peals correctly held otherwise; its decision has no prospective significance, because the regulations have been repealed; and this case would not be a suitable vehicle for deciding the validity of the regulations in any event, because petitioners appear to be ineligible for adjustment of status for independent reasons. This Court's review is therefore unwarranted. The Court may wish, however, to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the interim rules that repeal the challenged regulations.

1. a. Under Section 245 of the INA, the status of a paroled alien "may be adjusted by the Attorney General[] in his discretion." 8 U.S.C. 1255(a). As the court of appeals correctly recognized, "[a]dministrators vested with such discretion may exercise [it] by rule [rather than] on a case-by-case basis." Pet. App. 9a. Upholding a different regulation reflecting the exercise of the Attorney General's discretion under Section 245 of the INA, Judge Friendly observed that there is no "general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis." *Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970). This Court has confirmed that, when a statute grants discretion to an administrative decisionmaker, "the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability." *Lopez* v. *Davis*, 531 U.S. 230, 243-244 (2001) (quoting *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991)).

The regulations at issue here are therefore valid as long as they satisfy the familiar two-part test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U.S. 837 (1984). The court of appeals correctly held that they do. Pet. App. 7a-13a. Because Section 245(a) of the INA "is silent on the manner in which the Attorney General is to exercise his discretion," *Momin* v. *Gonzales*, No. 05-60119, 2006 WL 1075235, at *11 (Apr. 24, 2006), Congress has not "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842—*viz.*, whether the Attorney General may exercise his discretion by issuing a regulation that makes adjustment unavailable for a category of similarly situated aliens. And the regulations reflect "a reasonable policy choice," *id.* at 845, because they were adopted to prevent aliens who arrive illegally in the United States and are placed in removal proceedings from "delay[ing] their removal through an application for adjustment of status," 62 Fed. Reg. 452 (1997), and to help "preserve the integrity of the visa issuance process," 62 Fed. Reg. 10,326 (1997), by requiring an arriving alien "to return to his or her country of residence and request [an immigrant visa] through the consular process," *id.* at 452.

b. The regulations at issue in this case are analytically indistinguishable from the regulation upheld by this Court in *Lopez* v. *Davis*, *supra*. In *Lopez*, the Court held that a Bureau of Prisons (Bureau) regulation categorically denying early release to prisoners convicted of a firearm offense was consistent with a statute providing that the Bureau, in its discretion, may reduce the prison term of an inmate convicted of a nonviolent felony who successfully completes drug treatment. The Court agreed with the Bureau that the regulation was a permissible exercise of discretion "within the class of inmates who satisfy the statutory prerequisites for early release"—*i.e.*, those who were convicted of a nonviolent

offense and successfully completed drug treatment. 531 U.S. at 239 (quoting Bureau's brief).

So too here. Section 245(a) of the INA grants the Attorney General discretion to adjust the status of aliens who were "paroled into the United States" and satisfy certain conditions, 8 U.S.C. 1255(a), and the regulations merely provide that the Attorney General will not favorably exercise that discretion with respect to a subcategory of such aliens: those who are in removal proceedings. As in *Lopez*, the regulations are thus a permissible exercise of discretion "within the class of [aliens] who satisfy the statutory prerequisites for [adjustment of status]," 531 U.S. at 239—*i.e.*, those who were paroled and satisfy the other conditions in Section 245(a).

c. As the Fifth Circuit observed in upholding the regulations at issue here in *Momin*, *supra*, the four courts of appeals that have held the regulations invalid "all share a common trait": they "equate the entire class of parolees with the sub-class of parolees who are subject to removal proceedings." 2006 WL 1075235, at *12. Those courts "understand the regulation[s] to be in conflict with the statute" because "the regulation[s] make[] the latter class ineligible for relief and the statute makes the former class eligible for relief." *Ibid.* It is that understanding that "forms the core of the rationale for finding the regulation[s] invalid." *Ibid.*

As both the Fifth Circuit (in *Momin*) and the Eighth Circuit (in the decision below) correctly recognized, however, there is no legal or evidentiary basis for that understanding. 2006 WL 1075235, at *12; Pet. App. 12a n.9. On the contrary, the INA does not "mandate that parolees *must* be placed into removal proceedings," and in fact it "clearly provide[s] that at least *some* parolees

will *not* be placed into removal proceedings." *Momin*, 2006 WL 1075235, at *13. Indeed, according to DHS statistics, only a small percentage of parolees who entered the United States during a recent 12-month period (fiscal year 2003) have been placed in removal proceedings. See Resp. Supp. C.A. Br. 13 n.1. Even if "most aliens paroled into the United States were placed in removal proceedings," however, it would still be the case that Section 245 of the INA "does not show a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status." Pet. App. 14a n.9. Instead, "[r]elief remains discretionary." *Ibid.*

2. Review by this Court would be unwarranted even if the decision below were incorrect, because the regulations challenged by petitioners, and upheld by the court of appeals, have been repealed, effective May 12, 2006. 71 Fed. Reg. 27,585. That action was taken in interim rules issued by DHS and DOJ, both of which concluded that "having rules that apply nationwide is preferable to continuing to litigate the validity of [the regulations]." *Id.* at 27,587. By repealing the regulations, the interim rules themselves "resolve the conflict" in the circuits (*ibid.*) that petitioners have asked this Court to resolve (Pet. 10-15). And because the effect of the repeal is to allow USCIS to "exercise discretion to grant applications for adjustment of status * * * by aliens who have been paroled into the United States and * * * placed in removal proceedings" (71 Fed. Reg. at 27,588), the interim rules answer the question presented in the petition: whether the Attorney General may "categorically prohibit paroled aliens in removal proceedings from making such an application" (Pet. i). Accordingly, the question whether the regulations challenged by petitioners are valid has no prospective significance.

3. Even if there were some reason to decide the validity of the regulations despite their repeal, this case would not be a suitable vehicle for doing so, because petitioners appear to be ineligible for adjustment of status without regard to 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8). That is true for two independent reasons.

First, the record indicates that petitioners do not satisfy the requirements of Section 245(i) of the INA, the provision under which they sought to adjust their status. Under Section 245(i) and its implementing regulations, an applicant must be a beneficiary of a petition for an immigrant visa that was filed "on or before April 30, 2001," 8 U.S.C. 1255(i)(1)(B)(i), and was "approvable when filed," 8 C.F.R. 245.10(a)(1)(i)(A). A petition is "approvable when filed" if, as of the date of filing, it was "properly filed, meritorious in fact, and non-frivolous." 8 C.F.R. 245.10(a)(3). A petition is therefore "approvable when filed" if it is denied "due to circumstances that have arisen after the time of filing," *ibid.*, but not if it is denied "based on ineligibility at the time of filing," 66 Fed. Reg. 16,385 (2001). Germaine's petition was filed on February 20, 2002, Admin. R. 62, and thus was not filed on or before April 30, 2001. Jean's petition was filed on April 28, 2001, but it was denied because he could not show that "it was in the nation's interest for the Attorney General to waive the job-offer requirement of 8 U.S.C. § 1153(b)(2)(B)." Pet. App. 3a.[*] Because that

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[*] A job offer is one of the requirements for obtaining the employment-based immigrant visa that Jean sought. 8 U.S.C. 1153(b)(2)(A). The Attorney General may waive that requirement if he deems waiver to be in the national interest. 8 U.S.C. 1153(b)(2)(B).

circumstance did not arise after the date of filing, Jean's petition was not approvable when filed.[7]

Second, it does not appear that petitioners satisfy the requirements of Section 212(e) of the INA, 8 U.S.C. 1182(e) (2000 & Supp. III 2003), which applies to applications for adjustment of status by aliens who entered the United States pursuant to J-1 exchange visas. The countries that assist their citizens in obtaining such visas do so with the expectation that the visa holders will receive advanced training or experience and then return home to benefit their countries. See S. Rep. No. 1608, 84th Cong., 2d Sess. 4-5 (1956). For that reason, under Section 212(e) of the INA, a J-1 visa holder is ineligible to apply for permanent residence in the United States until he "has resided * * * in the country of his nationality * * * for an aggregate of at least two years following departure from the United States," although the requirement may be waived in certain circumstances. 8 U.S.C. 1182(e) (2000 & Supp. III 2003). Petitioners do not satisfy the two-year foreign-residency requirement, and Jean has failed in his attempts to obtain a waiver. After winning the diversity visa lottery in 1994, Jean "obtain[ed] a 'no objection' letter from the Congolese government * * * to relieve him of the J-1 two-year foreign residency requirement," but he "did not get it before his ability to obtain a diversity visa had expired." Pet. App. 2a n.2. We have also been informed by DHS that the Department of State recommended against granting Jean a Section 212(e) waiver in October 2004

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[7] Petitioners' ineligibility under Section 245(i) was raised by DHS in its opposition to the motion to reopen that petitioners filed with the BIA. Admin. R. 54. It was also raised by respondent in the court of appeals as an alternative basis for denying petitioners' petition for review. Resp. C.A. Br. 20-24.

and that, on the basis of that recommendation, USCIS denied his request for a waiver in March 2005.

4. The BIA relied solely on 8 C.F.R. 1245.1(c)(8) in denying petitioners' motion to reopen, Pet. App. 15a-16a, and the court of appeals relied solely on 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) in denying the petition for review of the BIA's denial of the motion to reopen, Pet. App. 5a-13a. Those regulations have since been repealed. Moreover, the effective date of the interim rules repealing the regulations, and permitting USCIS to consider applications for adjustment of status by arriving aliens in removal proceedings, is May 12, 2006, and the new rules apply to all cases pending on administrative or judicial review on that date. 71 Fed. Reg. at 27,585, 27,588. The Court may therefore wish to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the interim rules.

We note, however, that under the new rules—as under the rules that were in effect prior to 1997, when the regulations petitioners challenge in this case were adopted—the IJ and BIA have no jurisdiction to consider an application for adjustment of status filed by an alien in petitioners' position. Only USCIS may consider such an application. 71 Fed. Reg. at 27,587-27,588, 27,591-27,592 (amending 8 C.F.R. 245.2(a)(1) and 1245.2(a)(1)). Accordingly, if the case were remanded to the court of appeals, and then to the BIA, it is likely that the motion to reopen would again be denied, on the ground that the IJ has no jurisdiction over petitioners' applications for adjustment of status.

Petitioners, moreover, do not require any action by the court of appeals, the BIA, or the IJ to pursue an adjustment application with the appropriate administra-

tive decisionmaker (USCIS). And petitioners may request that United States Immigration and Customs Enforcement grant an administrative stay of the execution of the final removal orders now in effect if they elect to pursue an adjustment application. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-485 (1999).

Although petitioners must pursue any application for adjustment of status with USCIS and face substantial obstacles on the merits if they do, as matters now stand the BIA's denial of petitioners' motion to reopen rests solely on a regulation that is no longer in effect. For that reason, if this Court remands the case to the court of appeals, that court in turn might choose to remand the case to the BIA so that the BIA could reconsider the motion to reopen in light of the interim rules that repeal the regulation on which the BIA relied.

If this Court does not remand the case to the court of appeals for further consideration in light of the new rules, however, the petition for a writ of certiorari should be denied. The regulations petitioners challenge have been repealed, and the question of their validity raises no issue of continuing importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of the interim rules issued by the Department of Homeland Security and the Department of Justice on May 12, 2006, 71 Fed. Reg. 27,585. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

Jean Mouelle and Germaine Mouelle,
Petitioners,

v.

Alberto R. Gonzales.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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REPLY BRIEF FOR THE PETITIONERS

The question presented by the petition for certiorari is whether 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8) – which at the time the petition was filed prohibited parolees in removal proceedings (such as petitioners) from applying for adjustment of status – are inconsistent with Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and thus invalid. As described in the Brief for the Respondent, these regulations were repealed on May 12, 2006. See 71 Fed. Reg. 27,585, 27,587 (2006). The repeals are "applicable to all cases pending administrative or judicial review on or after May 12, 2006." *Id.* at 27,588. The judgment should accordingly be vacated and the case remanded in light of the regulatory change.

1. Respondent's continued insistence that the decision below was correct, Resp. Br. 9-12, is wrong, as the government's decision to abandon the regulations strongly suggests, see also Pet. 12-26. Moreover, it is purely academic, because the regulations that rendered petitioners ineligible to apply for adjustment of status have been repealed. Moreover, respondent's position that petitioners "appear to be ineligible for adjustment of status without regard to 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8)," Resp. Br. 13, was never addressed by either the BIA or the Eighth Circuit, see *id.* 15.

2. The sole issue before this Court is instead the appropriate disposition of the petition in light of the repeal of the regulations. Because the regulations have been repealed, the only basis in the record on which petitioners were denied the ability to seek an adjustment of status no longer supports the judgment below. As respondent acknowledges, the BIA and the court of appeals relied solely on the repealed regulations in denying petitioners the ability to reopen the removal proceedings to allow them to apply for adjustment of status. See Resp. Br. 15.

Respondent is thus correct that the appropriate course in this case is to "grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the interim rules." Resp. Br. 16. See, *e.g.*, *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981) (granting, vacating, and remanding the case for further consideration in light of intervening passage of the Economic Tax Recovery Act of 1981); *Lawrence* v. *Chater*, 516 U.S. 163, 165 (1996) (per curiam) (granting, vacating, and remanding the case in light of an intervening administrative reinterpretation of the Social Security Act, given the government's suggestion that the court of appeals could either decide the case "in light of the Commissioner's new statutory interpretation or remand the case to the Commissioner for reconsideration in light of that interpretation").

Respondent's alternative suggestion – that this Court simply deny certiorari because petitioners can now "pursue an adjustment application with the appropriate administrative decisionmaker (USCIS)," while their motion to reopen "would again be denied, on the ground that the IJ has no jurisdiction over petitioners' applications for adjustment of status," Resp. Br. 15-16 – is unduly speculative. As noted above, the BIA's original denial of the motion to reopen relied exclusively on the preclusive effect of Section 1245.1(c)(8). The BIA has never considered whether the IJ has jurisdiction to consider petitioners' applications, and such a determination is for the BIA, rather than this Court, to make in the first instance. See *Schmidt* v. *Espy*, 513 U.S. 801 (1994) (granting, vacating, and remanding the case in light of intervening changes in the law despite the government's assertion that petitioners might nonetheless be unsuccessful under the new regime).

Finally, the question whether new regulations can, years after the fact, foreclose petitioners from pursuing their original application for adjustment of status – an application that was foreclosed solely by a newly repealed regulation that

they have consistently challenged as invalid under the Immigration and Nationality Act – remains a live question that the court of appeals and the BIA should address in the first instance. Thus, remanding this case for further proceedings is the appropriate treatment of the petition.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, the decision of the Eighth Circuit vacated, and the case remanded for further consideration in light of 71 Fed. Reg. 27,585, 27,587 (2006) (repealing 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8)).

Respectfully submitted,

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